UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of James O. and Deplores Bad Horse and Christina Antelope (minor child), Charging Party, v. Richard D. Carlson and Dale Summy, Respondents.	HUDALJ 08-91-0077-1 Decided: July 31, 1997

Joseph H. Reed, Esquire
For Respondent Carlson

Thomas W. Clayton, Esquire
For Respondent Summy

Dorothy Crow-Willard, Esquire
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION
ON APPLICATION FOR ATTORNEY'S FEES

On November 14, 1994, I issued an Initial Decision dismissing a Charge of Discrimination against Respondents on the ground that the Charging Party had failed to prove by a preponderance of the evidence that Respondents had violated 42 U.S.C. §§ 3604(a),(b), or (c) of the Fair Housing Act, 42 U.S.C. 3601 *et seq.* ("the Act"). On December 7, 1994, that decision was remanded to me by the Secretary. On June 12, 1995, I issued an Initial Decision on Remand again finding no violation of section

3604(a), but finding violations of sections 3604(b) and (c). That decision became the final decision of the Department.

Respondents appealed the Initial Decision on Remand to the United States Court of Appeals for the Eighth Circuit. On April 5, 1996, the Eighth Circuit reversed the finding of violations of the Fair Housing Act and ordered the Secretary to dismiss the charges. On March 11, 1997, a designee of the Secretary issued an order dismissing the Charge of Discrimination.

Respondent Carlson now seeks attorneys fees and costs, pursuant to the Equal Access to Justice Act ("EAJA") codified at 5 U.S.C. § 504, 24 C.F.R. § 140.940 and 24 C.F.R. part 14. (*See also* 24 C.F.R. § 180.705, effective November 4, 1996). He filed his application on April 14, 1997. The Charging Party filed a memorandum in opposition on April 22, 1997.

Respondent Carlson's application does not clearly state whether he seeks attorney fees and costs for defending the case at the administrative level or for pursuing an appeal in the Eighth Circuit, as well.[1] However, I note that by Order dated June 4, 1996, the United States Court of Appeals for the Eighth Circuit denied his petition for fees covering appearances before that court. Accordingly, I consider his current application to be limited to the proceedings at the administrative level. The Application will be Denied.

Under 5 U.S.C. § 504(c)(2), when an agency has conducted an adversary adjudication, a qualified "prevailing party" as defined at 5 U.S.C. § 504(b)(1)(B) is entitled to recover the fees and other expenses incurred by that party in connection with the proceeding, unless the adjudicative officer of the agency finds that the position of the agency was "substantially justified." 5 U.S.C. § 504(a)(1). It is clear that Respondent is a "prevailing party" in this case.

The term "substantially justified" means "justified in substance or in the main -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It means "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Id. at 567.* Thus, the "substantial justification standard applied under the EAJA treads a middle ground between an

[1]Although the application states that Respondent is seeking an award for proceedings contained in file #HUDALJ 08-91-0077-1, the application includes fees totalling $4,150.98, incurred before the Eighth Circuit. *See* Application for Attorney's Fees and Costs (page 2 of itemized fees).

automatic award of fees to the prevailing party and one made only when the Government has taken a patently frivolous stand." *Losco v. Bowen*, 638 F. Supp. 1262, 1265 (S.D.N.Y. 1986). Under the substantial justification standard, the tribunal "only considers whether there is a reasonable basis in law and fact for the position taken by the Secretary." *Welter v. Sullivan*, 941 F. 2d 674, 676 (8th Cir. 1991).

Background

Richard D. Carlson owned a duplex in Sioux Falls, South Dakota. After he moved out of state, he rented the duplex to various tenants. He was assisted in renting the unit by Respondent Dale Summy.

On the occasion which triggered the filing of the Charge of Discrimination, Mr. Summy rented the duplex's small upstairs apartment to James O. Bad Horse, who told Mr. Summy that he would be living in the unit with his wife and child. Mr. Bad Horse, his wife, and his child are Native American. Mr. Summy informed Mr. Carlson by telephone that he had rented the unit to Mr. Bad Horse, his wife, and his child.

On the day that the Bad Horses moved in, a tenant who had lived for some time in the downstairs unit called Mr. Carlson to complain that the Bad Horses had damaged the yard and the building during the move. The complaining tenant also indicated there were four or more people moving into the upstairs apartment. After considering the tenants' complaints, Mr. Carlson instructed Mr. Summy to ask the Bad Horses to leave. The Bad Horses moved out as requested and then filed a complaint of housing discrimination. The Charge of Discrimination alleged discrimination by Respondents based on national origin and on familial status in violation of 42 U.S.C. §§ 3604(a) and (b). It further alleged that Mr. Carlson made a discriminatory statement in violation of 42 U.S.C. § 3604(c).

In the Initial Decision on Remand, which became the final decision of the Secretary, I dismissed the charge of discrimination based on national origin. However, I found in favor of the Government on the familial status and the statement violations. I found that Respondent had unlawfully enforced a policy having a disparate impact on families with children in violation of 42 U.S.C. § 3604(b). I found also that Mr. Carlson had made a statement indicating a preference not to rent to families with children, in violation of 42 U.S.C. § 3604(c).

Respondents appealed the findings of discrimination to the Eighth Circuit Court of Appeals. By Order dated April 5, 1996, that Court reversed the final decision of the Secretary and ordered dismissal of all charges.

Respondent now seeks attorney's fees and costs for having to defend the charges at the administrative level. He asserts that HUD's position in bringing the Charge of Discrimination and in prosecuting the case was not substantially justified in that had HUD vigorously and thoroughly investigated the allegations before issuing the Charge of Discrimination, the charges "may not have been" brought. He asserts further that at the trial, HUD "could offer no credible evidence that a violation" of 42 U.S.C. §§ 3604(a),(b) and (c) occurred.

In reply, the Government argues that despite the fact that the agency lost the case before the Eighth Circuit Court of Appeals, it had a reasonable basis in law and fact to charge Respondent with discrimination on all the bases alleged and to pursue those charges at the administrative level. I agree.

Substantial Justification

The fact that the agency lost the case, either at the trial or appellate level, does not mean that the agency's position was not "substantially justified." *Pierce*, 487 U. S. at 569. *See also Brouwers v. Bowen*, 823 F.2d 273 (8th Cir. 1987). Indeed, the Eighth Circuit Court of Appeals determined that the agency's position in defending the appeal of this case to the Eighth Circuit was substantially justified.

To show substantial justification, the Government's litigating position must have had a reasonable basis in law and fact. There must have been a reasonable basis for the facts asserted, a reasonable basis in law for the legal theory proposed, and support for the legal theory by the facts alleged. *Welter v. Sullivan*, 941 F.2d at 676.

We begin with a discussion of the charges of familial status and statement violations, as to which the Government prevailed at the administrative level and defended before the Court of Appeals. An initial consideration is whether Respondent is barred from relitigating the issue of substantial justification based on the doctrine of "issue preclusion."

The doctrine of "issue preclusion" or "direct estoppel" bars relitigation of any factual or legal issue that was actually litigated and necessarily decided by final disposition on the merits in previous litigation between the same parties, where the parties had full and fair opportunity to litigate. *National Post Office Mail Handlers, et al v. American Postal Worker Union,* 907 F. 2d 190 (D. C. Cir. 1990); *In re Belmont Realty Corp.*, 11 F.3d 1092, 1097 (1st Cir. 1993); *Burgos v. Hopkins,* 14 F. 3d 787, 789 (2nd Cir. 1994); *Ramsay v. United States, I.N.S.*, 14 F. 3d 206, 210 (4th Cir. 1994); *Koch v.*

City of Hutchinson, 814 F. 2d 1489, 1493 (10th Cir. 1987); *Bradley v. Pittsburg Board of Education*, 913 F. 2d 1064, 1073 (3d Cir 1990); *In re Duncan*, 713 F. 2d 538, 541 (C.A. Cal. 1983).

The issue before me is identical to the one before the Eighth Circuit. The underlying charges as well as the Government's litigating position have been the same in this case since the Charge of Discrimination was filed. Therefore, any determination on the issue of substantial justification I make necessarily involves consideration of the identical factors considered by the Eighth Circuit. Since the litigating position of the Government during the agency proceedings was identical to its litigating position taken on appeal to the Eighth Circuit, it is only logical that if its litigating position was substantially justified at the appellate level, it was, *a fortiori,* substantially justified at the administrative hearing level. Accordingly, I find that the determination by the Eighth Circuit Court of Appeals that the Government was substantially justified in its position with regard to the charges at issue before that Court, is conclusive in this case as to those charges.

The Charging Party was also substantially justified in charging Respondent with discrimination on the basis of national origin in violation of 42 U.S.C. § 3604(a). That charge was dismissed in the final decision of the Secretary. Although the charge was dismissed, it was established in the decisions that the Charging Party had made a *prima facie* showing of national origin discrimination by Mr. Carlson. The evidence established that the Bad Horse family were Native American. It included testimony from Mr. Bad Horse that Respondent Summy told him that the reason Mr. Carlson was requiring his family to move was because he did not want to rent to "your kind of people" and because Mr. Carlson had had problems with Native Americans in the past. There was evidence, as well, that Respondent Carlson asked the Bad Horse family to move after he received complaints from a downstairs' tenant who voiced dislike for Native Americans. The finding of a *prima facie* case supports finding substantial justification. *See Secretary v. Medige*, HUDALJ, Fair Housing-Fair Lending ¶25,093 at 25,846 (1996).

While Respondent asserts that Mr. and Mrs. Bad Horse were not credible in their allegations, the Government had a right to test the credibility of the Complainants and other witnesses at trial, so long as it did not have clear evidence of their unbelievability. *See Gowen v. Bowen*, 855 F. 2d 613 (8th Cir. 1988) and *Albrecht v. Heckler*, 765 F.2d 914 (9th Cir. 1985) (the government is substantially justified where the evidence is highly disputed). *See also Europlast Ltd. v. N.L.R.B.*, 33 F. 3d 16, (7th Cir. 1994) and *Temp Tech. Industries Inc. v. N.L.R.B.*, 756 F. 2d 589 (7th Cir. 1988). Although there was significant credible evidence which contradicted the Government's case, it had a believable factual basis for the charge of national origin discrimination. It was possible

to draw a set of inferences from the circumstances in the case that would have supported the Government's position. Therefore, its position had a reasonable factual basis. *See Europlast, Ltd. v. N. L. R. B.*, 33 F. 3d at 18.

Conclusion

The Government had a reasonable basis in law and fact for the charges it brought against Respondent. It was, therefore, substantially justified in bringing the Charge of Discrimination against him alleging violations of 42 U.S.C. §§ 3604 (a), (b) and (c), and in litigating at the administrative level. Respondent's Application for Attorney's Fees and Costs is hereby DENIED.

So ORDERED.

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION ON APPLICATION FOR ATTORNEY FEES issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 08-91-0077-1, were sent to the following parties on this 31st day of July, 1997, in the manner indicated:

_____
Chief Docket Clerk

REGULAR MAIL:

James O. & Delores Bad Horse
P.O. Box 2385
Grand Island, Nebraska 68802

Thomas Clayton, Esq.
P. O. Box 1085
Sioux Falls, SD 57101

Joe Reed, Esq.
The Dorothy Firm
600 S. Cliff Street
Sioux Falls, SD 57104

Dorothy Crow Willard, Esq.
Office of Regional Counsel
U. S. Department of Housing and Urban Development
633 17th Street, 13th Floor
Denver, CO 80202-3607

INTEROFFICE MESSENGER:

Susan Forward, Deputy Assistant Secretary
for Enforcement and Investigation
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410

Harry L. Carey, Assistant General Counsel for Fair Housing
Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 9238

Washington, D.C. 20410